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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/845,941	04/30/2001	Michael G. Hayek	IAM 0618 PA	3312

7590 11/27/2002

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EXAMINER
BAHAR, MOJDEH

ART UNIT	PAPER NUMBER
1617	//

DATE MAILED: 11/27/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 09/845,941	Applicant(s) HAYEK ET AL.	
	Examiner Mojdeh Bahar	Art Unit 1617	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *12 August 2002* .

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-4 and 6-11* is/are pending in the application.

4a) Of the above claim(s) *6-9* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-4,10 and 11* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Applicant's response to the first office action of March 5, 2002 and amendment, submitted August 12, 2002 (Paper No. 10) is acknowledged.

This application contains claims 6-9 drawn to an invention non-elected with traverse in Paper No. 5. A complete reply to the final rejection must include cancellation of non-elected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.01.

Claims 1-4 and 10-11 are herein examined on the merits.

The numbering of claims is not in accordance with 37 CFR 1.126 which requires the original numbering of the claims to be preserved throughout the prosecution. When claims are canceled, the remaining claims must not be renumbered. When new claims are presented, they must be numbered consecutively beginning with the number next following the highest numbered claims previously presented (whether entered or not).

Misnumbered claims 6 and 7 have been renumbered claims 10 and 11.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-4 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reinhart (EP 0678247 A1).

Reinhart (EP 0678247 A1) teaches a pet food (for animals including cats) composition comprising omega-6 and omega-3 fatty acids, herein the ratio of said omega-6 fatty acids to said

omega-3 fatty acids is from 3:1 to 10:1 (most preferably from 5:1 to 7.5:1), and wherein at least 15% of the total fatty acids in said composition are said omega-6 fatty acids and at least 3% of the total fatty acids in said composition are said omega-3 fatty acids see in particular claims 1-2, and 4. Reinhart (EP 0678247 A1) also teaches that omega-3 fatty acids are one or more compounds selected from the group consisting of eicosapentaenic acid and docosahexaenic acid and alpha-linolenic acid, and omega-6 fatty acids are one or more compounds selected from the group consisting of fish oil and flax, see claims 5 and 6 in particular. Reinhart (EP 0678247 A1) teaches that the percentage of crude fat is 20-23%, see page 3, line 41 in particular.

Reinhart (EP 0678247 A1) does not teach the percentage of fat in the composition to be between 7 and 14%.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to employ between 7 and 14% of fat in the composition of Reinhart.

One of ordinary skill in the art would have been motivated to employ between 7 and 14% of fat in the composition of Reinhart because the prior art amounts are similar to those herein and optimization of amounts is within the skill of the artisan and is therefore obvious.

Claims 10-11 rejected under 35 U.S.C. 103(a) as being unpatentable over Reinhart (EP 0678247 A1) as applied to claims 1-4 above, and further in view of Brown et al. (USPN 4,229,485).

Brown et al. (USPN 4,229,485) teaches that cat foods can be canned or in kibble form. Brown et al. further teaches that vitamins and minerals can be added to the cat food. see in particular col. 1, line 1 to col. 2, line 40 and col. 5, lines 56-61.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to incorporate vitamins and minerals in the cat food composition of Reinhart. It would have also been obvious to employ the solid cat food of Reinhart in kibbles or canned cat food.

One of ordinary skill in the art would have been motivated to incorporate vitamins and minerals in the cat food composition of Reinhart because they are known to be useful in cat food compositions. The Skilled Artisan would have also been motivated to incorporate the cat food of Reinhart in many different physical forms because these forms/types of cat food are all widely known in the art.

Claims 1-4 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pscherer et al. (WO 97/19683) in view of UC Berkley Wellness Letters (provided in the office action of 8/24/2001).

Pscherer et al. (WO 97/19683) teaches a lipid emulsion comprising from 35% to 65% by weight of the vegetable oils which supply omega-6 fatty acids and from 5% to 20% by weight of the fish oils which supply omega-3 fatty acids, claim 1 in particular. Pscherer et al. (WO 97/19683) also teaches that the predominant omega-6 fatty acid in the vegetable oils is alpha linolenic acid, page 1 line 36 to page 2 line3, particularly. Pscherer et al. (WO 97/19683) also teaches that the predominant omega-3 fatty acids in fish oil are eicosapentaenic acid and docosahexaenic acid, page 2, lines 5-9.

Pscherer et al. (WO 97/19683) does not particularly teach flaxseed as a source of linolenic acid, or the particular amount of total fat recited herein.

UC Berkeley Wellness Letters teaches that flaxseed and flaxseed oil are by far the best source of alpha linolenic acid, see page 1.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to employ flax seed oil as the source of linolenic acid in the Pscherer composition.

One of ordinary skill in the art would have been motivated to employ flax seed oil as the source of linolenic acid because flaxseed oil is known to be by far the best source of alpha linolenic acid and would be reasonably expected to have the exhibit the similar characteristics as other plant oils whose predominant omega-6 fatty acid is linolenic acid.

Note that the recitation of intended use does not further limit a claim drawn to a composition.

Response to Arguments

Applicants' arguments regarding non-obviousness of the claims have been considered, but are not persuasive to remove the obviousness rejection in the previous office action.

Applicant argues that Reinhart teaches away from the low fat composition of the invention herein. Note that optimization of amounts is within the purview of the skilled artisan, absent a showing of criticality. No such critical showing is seen. Applicant also argues that flax seed oil shows minimal immunosuppressive activity compared to fish oil. Note that there is no showing to this effect in the specification. A showing of "unexpected results/benefits" needs to be clear, convincing and commensurate in scope (with the claims).

Applicants first argue that Psherer et al. teaches an emulsion while the claims herein are drawn to a pet food composition, note that the recitation of intended use does not further limit a claim drawn to a composition. Applicant argues that the UC-Berkeley reference of June 1999 *Just the Flax, Please* does not cure the deficiencies of Psherer because this reference basically teaches flaxseed oil as the best source of alpha-linolenic acid. Applicant further states that

applicant is not the first to include alpha-linolenic acid in a composition, but is the first to provide a composition wherein the majority of omega-3 fatty acids comprises alpha-linolenic acid derived from flaxseed oil, said composition comprising from about 7 to 14% by weight of total fat. Note that the Berkeley reference does indeed cure the deficiencies of Psherer because the information taught in the Berkeley reference, i.e., that flaxseed oil is the best source of alpha-linolenic acid motivates the Skilled Artisan to employ flaxseed oil as a source of alpha-linolenic acid instead of the fish oil employed in Psherer.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.,* 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mojdeh Bahar whose telephone number is (703) 305-1007. The examiner can normally be reached on (703) 305-1007 from 8:30 a.m. to 6:30 p.m. Monday, Tuesday, Thursday and Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padnmanabhan, can be reached on (703) 305-1877. The fax phone number for the organization where this application or proceeding is assigned is (703) 308-4556.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.

Mojdeh Bahar
Patent Examiner
November 22, 2002

SREENI PADMANABHAN
PRIMARY EXAMINER 11/25/02